

**Weng Neng Medical & Liquor (KL) Sdn Bhd v
Fountain Industries Sdn Bhd**

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 11-7-1991
JAMES FOONG J
7 MAY 1994

Civil Procedure — Appeal — Affidavit attempting to adduce fresh evidence — Whether a party to the proceedings — Whether affidavit should not be allowed

Labour Law — Employment — Claim for wages owing — Moveable properties at alleged place of employment auctioned off to satisfy arrears of rental — Whether employee entitled to priority payment over other creditors — Whether employee employed at such premises at material time — Employment Act 1955 s 31

Words and Phrases — Decree — Employment Act 1955 s 31

The appellants were the landlords of certain premises ('the demised premises') and the respondents were the tenants. The appellants issued a writ of distress against the respondents to distrain the moveable properties of the respondents in the demised premises to recover a sum of RM12,000 being arrears of rental. An order for the issue of a warrant of distress was granted and the properties of the respondents on the demised premises were auctioned off. Before the appellants could apply for the release of the sum from the court, the court received a letter from the labour office alleging that five employees of the respondents ('the employees'), whose salaries amounted to RM15,244.77, were not paid by the respondents, and under s 31 of the Employment Act 1955 ('the Act'), the employees were entitled to priority payment from the proceeds of sale of the respondents' properties over other creditors. The appellants applied for the release to them of the proceeds of sale and the magistrate dismissed the appellants' application and ordered that the proceeds of sale be released to the employees. The appellants have appealed.

During the course of the hearing of the appeal, the employees filed an affidavit, the admission of which was objected to by the appellants' counsel for the reason that it contained materials which were not disclosed earlier and amounted to an admissibility of fresh evidence. The part that was most vehemently opposed was the assertion by the employees that they were employed and working at the demised premises at the time the auction was carried out.

Held, allowing the appeal:

- (1) Although the employees had not formally applied to intervene in these proceedings, they had at all material times been accepted by the magistrate as a party. Arising from this, any attempts to

- A introduce the employees' affidavit where fresh evidence was allegedly contained should not be allowed.
- (2) The magistrate had failed to consider the absence of any evidence that the employees were working at the demised premises at the material time. There was no denial to the appellants' allegation that the respondents never employed any employees to work at the demised premises which was a warehouse. Therefore, such contention could be considered as the truth. That being the case, the employees failed to qualify for priority payment under the proviso of s 31 of the Act and are, therefore, not entitled to the proceeds of sale in priority to the appellants.
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Per curiam:

- There was no necessity for the affidavit by the employees to be filed since they were already parties to the proceeding. Moreover, the introduction of fresh evidence require the fulfilment of three conditions: (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; (b) the evidence must be such, that if given, would probably have an important influence on the result of the case, though need not be decisive; and (c) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though need not be incontrovertible. Here, the employees had failed to satisfy the first condition.
- D
- E

[Bahasa Malaysia summary]

- Perayu merupakan tuan tanah premis tertentu ('premis demis itu') dan responden merupakan penyewa premis demis itu. Perayu telah mengeluarkan suatu writ distres terhadap responden untuk merampas harta boleh alih responden di dalam premis demis itu untuk mendapat balik sewa sebanyak RM12,000 yang masih terhutang. Suatu perintah untuk pengeluaran suatu waran distres telah diberikan dan harta responden di dalam premis demis itu telah dilelong. Sebelum perayu dapat memohon supaya wang itu dilepaskan oleh mahkamah, mahkamah telah menerima sepucuk surat daripada pejabat buruh yang mengatakan bahawa lima orang pekerja responden ('pekerja itu'), yang gaji mereka berjumlah sebanyak RM15,244.77, belum dibayar oleh responden, dan di bawah s 31 Akta Pekerjaan 1955 ('Akta itu'), pekerja itu berhak mendapat bayaran prioriti daripada hasil jualan harta responden berbanding dengan pemiutang yang lain. Perayu telah memohon supaya hasil jualan itu dilepaskan kepada mereka dan majistret itu telah menolak permohonan perayu dan telah memerintahkan supaya hasil jualan itu dilepaskan kepada pekerja itu. Perayu telah membuat rayuan.
- F
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- H
- I

Semasa pendengaran rayuan itu, pekerja itu telah memfailkan suatu afidavit, dan kebolehan terimaannya telah dibantah oleh peguam

perayu atas alasan bahawa ianya mengandungi maklumat yang tidak didedahkan pada peringkat yang lebih awal dan yang terjumlah kepada suatu kebolehan terimanya keterangan yang baru. Bahagian yang telah dibantah oleh perayu secara bersungguh-sungguh adalah penegasan pekerja itu bahawa mereka telah digaji dan sedang bekerja di premis demis itu pada masa jualan lelong itu dijalankan.

Diputuskan, membenarkan rayuan itu:

- (1) Walaupun pekerja itu tidak memohon secara formal untuk mencelah di dalam prosiding itu, mereka telah diterima sebagai sebuah pihak oleh majistret itu pada setiap masa yang penting itu. Oleh itu, sebarang percubaan untuk membangkitkan affidavit pekerja itu di mana dikatakan terdapat keterangan baru sepatutnya tidak dibenarkan.
- (2) Majistret telah gagal mempertimbangkan ketidakhadiran sebarang keterangan bahawa pekerja itu sedang bekerja di premis demis itu pada masa yang penting itu. Tidak terdapat penafian terhadap pengatahan perayu bahawa responden tidak pernah menggaji sebarang pekerja untuk bekerja di premis demis itu yang merupakan sebuah gudang. Oleh itu, penegasan sedemikian boleh dianggap sebagai benar. Dengan demikian, pekerja itu tidak layak mendapat bayaran prioriti di bawah proviso kepada s 31 Akta itu dan oleh itu, mereka tidak berhak mendapat hasil jualan secara prioriti berbanding dengan perayu.

Per curiam:

Affidavit pekerja itu tidak perlu difailkan kerana mereka memang merupakan pihak kepada prosiding itu. Lebih-lebih lagi, pengenalan keterangan baru memerlukan supaya tiga syarat dipenuhi: (a) ia mesti ditunjukkan bahawa keterangan itu tidak dapat diperolehi dengan ketekunan yang munasabah untuk kegunaan di dalam pendengaran itu; (b) keterangan itu mestilah sedemikian rupa sehingga, jikalau diberi, mungkin akan mempengaruhi secara penting keputusan kes itu, walaupun ia tidak perlu bersifat muktamad; dan (c) keterangan itu mestilah bersifat sedemikian rupa sehingga ianya dapat dipercayai, atau dalam lain perkataan, ianya mestilah nampaknya boleh dipercayai walaupun tidak perlu tidak dapat dipertikaikan. Di dalam kes ini, pekerja itu telah gagal memuaskan syarat pertama.]

Cases referred to

- Chai Yen v Bank of America National Trust and Savings Association* [1980] 2 MLJ 142 (refd)
- Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489 (refd)
- Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 (refd)
- Lee Chow Moi v Chia Chin Foo* (1924) 4 FMSLR 167 (refd)

A **Legislation referred to**
Employment Act 1955 s 31

TL Gan (Yong & Rakan-Rakan) for the appellants.
Balan S Nair (Seah Balan Ravi & Co) for the respondents.

B **James Foong J:** The appellants, in this case, were the landlords of certain premises known as 105, Jalan Satu, Kaw 3, Taman Klang Jaya, Klang, Selangor (which I shall hereinafter refer to as 'the demised premises'). The respondents were the tenants.

C On or about 17 April 1989, a writ of distress was issued by the appellants against the respondents to distrain the moveable properties of the respondents in the demised premises to recover a sum of RM12,000 being arrears of rental. Consequent to this, an order for the issue of a warrant of distress was granted by the registrar of the Klang Magistrates' Court. Acting upon this warrant of distress, the bailiff seized the properties

D of the respondents on the demised premises and subsequently, auctioned it off. The net proceeds of the auction was deposited in the Klang Magistrates' Court. The appellants then made an application to the said court for the release, of the sum due on the arrears of rental out of the proceeds of sale, to them. Before this application was heard, the said court received a letter from the labour office alleging that five employees of the

E respondents, whose salaries amounted to RM15,244.77, were not paid by the respondents, and under s 31 of the Employment Act 1955 ('the Act'), these employees were entitled to priority payment from the proceeds of sale of the respondents' properties over other creditors.

F On 9 August 1989, the application of the appellants for the release to them of the proceeds of sale was heard before the magistrate in Klang. From the appeal records, one Mr David, apparently a labour officer, appeared supposedly for the five employees.

G The learned magistrate, after hearing submissions from the appellants and Mr David, dismissed the appellants' application. He further ordered that the proceeds of sale be released to the five employees after the labour office has ascertained their claim in an enquiry. It is in respect of this decision that the appellants are now appealing against.

H When this appeal first came up for hearing, the five employees were represented by their counsel, Mr Balan. I enquired on the locus standi of his clients in these proceedings as I find no record of an order allowing them to intervene. I adjourned this matter for the parties to submit on the issue of locus standi. At the next hearing of this appeal, Mr Balan applied on behalf of the five employees to intervene in these proceedings. To support this application, one of the employees representing the five filed an affidavit. The admission of this affidavit was objected to by the appellants'

I counsel for the reason that it contained materials which were not disclosed earlier and would amount to an admissibility of fresh evidence. The part that was most vehemently opposed was the assertion by the employees that

they were employed and working at the demised premises at the time the auction was carried out.

This issue is material for the reason that before s 31 of the Act is applicable, the employees must be working at the place where the goods were auctioned off. Though the appellants had in their affidavit, filed before the hearing of the application before the magistrate, asserted that no employees were working at the demised premises at the time when the respondents' properties were auctioned, no denial of any form came from the employees until now. To introduce this assertion at this stage will according to the appellants' counsel, not only introduce fresh evidence but, also would cover up any defects in the employees' claim.

After careful consideration of the evidence in the appeal records and to the sequence of events, I find that though the five employees had not formally applied to intervene in these proceedings, they had in fact at all material times been accepted by the magistrate as a party. The court, in entertaining the letter from the labour office, the hearing of the submissions by Mr David representing the five employees, and the order of the magistrate directing payments from the proceeds of the auction to the five employees after an inquiry, were all acts and conducts of acceptance of these employees as an intervening party to the proceedings.

Arising from this, I find that any attempts to introduce the employees' affidavit at this stage of the proceedings where fresh evidence is allegedly contained therein, should not be allowed. In the first place, there is no necessity for this affidavit to be filed since the employees were and are already parties to these proceedings. Secondly, the introduction of fresh evidence require the fulfilment of the three conditions as stated in the celebrated case of *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489 which is adopted in our Malaysian law through the cases of *Chai Yen v Bank of America National Trust and Savings Association* [1980] 2 MLJ 142 and *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148. The three conditions are:

- (a) that it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial;
- (b) that the evidence must be such, that if given, would probably have an important influence on the result of the case, though need not be decisive; and
- (c) that the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though need not be incontrovertible.

In respect of these conditions, I find that the employees have failed to satisfy the first. The appellants had made allegations that no employees were working in the demised premises at the time of the auction at the earliest possible stage of these proceedings. Though the five employees had every opportunity to deny this fact, it was not done. Their representative, the labour office, were aware of the importance of this material fact. This is evidenced by their letter to the magistrates' court which referred to this

- A prerequisite condition in order to qualify for priority payment. The evidence on this matter could have, with reasonable diligence been obtained and tendered at the trial before the magistrate. However, since the employees had failed to do so, it cannot be admitted now.

- B I need not proceed with the second and third condition, for failure of any one of the three conditions in respect of the admission of fresh evidence at this stage would be sufficient to justify the rejection of these new evidence.

The next issue is whether the evidence as it stands in the appeal records justify the magistrate in arriving at his decision.

- C The appellants argued that besides, s 31 of the Act not being applicable to employees who were not working at the demised premises at the material time, the warrant of distress obtained from the court is also not a 'decree'. As it is not a 'decree', s 31 of the Act is not applicable to the employees. This contention arose from the use of the word 'decree' in s 31 of the Act which reads as follows:

- D Where by order of a court made upon the application of any person holding a mortgage, charge, lien or decree (hereinafter referred to as 'the secured creditor') ...

- E To support their contention, the case of *Lee Chow Moi v Chia Chin Foo* (1923) FMSLR 167 was cited. In this case, the judicial commissioner ruled that a distress warrant was not a decree for the reason that it was made upon an ex parte proceeding. Frankly, I find no justification whatsoever for the support of this principle.

- F A 'decree' is defined in 1 *Dictionary of English Law* (1959) as, 'an order of the court pronounced on hearing of a suit, now mainly used in matrimonial suits'. From the proceeding paragraphs of the definition in this dictionary, I am of the view that this is an old English legal term used in the English courts during the time when the courts of equity and common law were distinct and separate. For all intent and purposes it amounts to 'a final order of a court in a suit' as defined in 2 *Stroud's Judicial Dictionary* (5th Ed, 1986).

- G When the writ of distress in this case was filed in the Klang Magistrates' Court, though made ex parte, it was heard by the registrar before an order to issue a warrant of distress was made. The registrar must have considered all relevant facts disclosed in the supporting affidavit of that application before coming to his decision. His decision handed down in the form of an order stands as a final order of the court unless it is set aside. Under such circumstances, as this order of the registrar was pronounced after a hearing and that it is a final order unless set aside, it must be a decree. As the order for the issue of a warrant of distress is a decree, s 31 of the Act is applicable in this case.

- I The second question to be answered now is whether the employees were working at the demised premises when the auction took place. On this, I find that the learned magistrate had failed to consider the absence of any evidence that these five employees were working at the demised

premises at the material time. There is no denial to the appellants' allegation that the respondents never employed any employees to work at the demised premises which was a warehouse. When there is no such denial, then such contention can be considered as the truth. This being the case, the employees have failed to qualify for priority payment under the proviso of s 31 of the Act. They are, therefore, not entitled to the proceeds of sale in priority to the appellants.

I therefore allow this appeal with costs and order that sufficient amount of the proceeds of sale in the Klang Magistrates' Court be released to the appellants to satisfy the writ of distress.

Order accordingly.

Reported by Jeanne Tan

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